COURTING ANARCHY

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This essay is dedicated to the memory of journalist Ruth Bayard Smith, who is remembered for a blessing. Ruthie combined craftsmanship and compassion, and she did so with remarkable grace, courage, and aplomb.

Cynical? Of course I am. How can you be a lawyer and not be cynical? But a cynic? I am not a cynic. Cynics are the second-, the third-raters. For the cynics I have nothing but contempt. There are rules, basic rules—they may change, they may or may not be to your liking—but there are rules. The cynics don't give a damn about the rules.[1]

INTRODUCTION

Supporters and opponents alike view *Bush v. Gore*[2] as an extraordinary decision dealing with an extraordinary set of facts. Indeed, defenders of the decision often invoke a necessity defense: but for the Supreme Court's quick action in taking and deciding *Bush v. Gore*, the argument goes, the nation might have been plunged into chaos and anarchy.[3] The Court's extreme solicitude for the statutory "safe harbor" available to the states, for example, thus serves as a synecdoche for the safe harbor that the Court was compelled to provide a divided nation. To many observers, however, the double Catch-22 in the Court's cagey questions on remand concerning the basis for the Florida Supreme Court's decision and timing—compounded by the Court's use of a stay to help run out the clock (apparently without considering the traditional judicial power to stop a running legal clock)—makes *Bush v. Gore* seem more like undue enthusiasm for any port in a storm.

My thesis is that *Bush v. Gore*, though it may embody considerable anarchy and chaos, actually is unexceptional. Through consideration of a small sampler of the Court's decisions in the months immediately following its notorious presidential election decision, we will see significant ways in which *Bush v. Gore* was hardly atypical at all. This series of decisions about the

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[1] LAWRENCE JOSEPH, LAWYERLAND: WHAT LAWYERS TALK ABOUT WHEN THEY TALK ABOUT LAW 35 (1997). *See generally The* Lawyerland *Essays*,101 COLUM. L. REV. 1730-1796 (2001).

[2] 531 U.S. 98 (2000).

[3] Richard Posner spins out a chaotic scenario of national crisis leading to Larry Summers becoming the first Jewish president, to the horror of "semitophobes." RICHARD POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION AND THE COURTS 137-39 (2000) (discussing who would occupy the role of acting president if the general election remained unresolved on January 20, 2001). Throughout his book, Posner repeatedly claims that the nation faced chaos and a major threat to order, thereby making it a close question, but, in his view, justifying the Court's "rough justice." *Id.* at 147-49 (discussing whether or not the Supreme Court's decision in *Bush v. Gore* constituted an injustice). Posner actually makes a significant mathematical error when he forgets the Nader candidacy and other minor party votes, leading him to concede too much to Gore; for example, he states that "if the question is what percentage of the people who voted in the Florida election thought they were voting for Gore, the probable answer is more than 50 percent." *Id.* at 88-89. He states further that "the majority who cast votes thought they voted for Gore." *Id.* at 177. Hardly anyone has attempted to defend the Court's radical innovation in what Posner described as the Court's "tatterdemalion equal protection ground." *See id.* at 187 (addressing the alternative rationale for hearing *Bush v. Gore* set forth in the Court's opinion).

amount of deference due to other decision-makers reveals a majority of the Justices that does not feel bound by constitutional text, precedent, prudential restraint, or the votes of the populace. Neither the usual constraints of judicial craftsmanship nor the messy processes of democracy act as significant barriers before the march of an increasingly Imperial Court.

Though the current Court does mouth the usual shibboleths about its commitment to upholding democracy—but perhaps not to following the election returns[4]—its decisions disclose a new metafederal courts' approach.[5] This newfangled brand of carefree interventionism does not embrace those excluded, or those who repeatedly have been losers within our flawed election system. Instead—in cases large and small—the Court already is well along in putting in place a series of default rules that favor those already ahead in power and resources. This campaign nibbles away at the foundational premises of both politics and law.

In the months after *Bush v. Gore*, the Justices mirrored that case's approach over and over. They repeatedly asserted their independence from the usual rules, as well as from the authority of more democratic decision-makers. The overarching value in the new metafederal courts is that the Supreme Court, and no one else, holds and protects "The Secret." The Court's pronouncements about federalism, for example, no longer need to be anchored in text or precedent. As long as the bare majority's choices are emphatic, the Justices seem to believe that neither explanation nor attention to practical effects is to be expected. *Bush v. Gore* turns out to be hardly atypical for the current, counterdifficultarian majority.

To be sure, any new case poses the possibility of a "reconsideration of

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[4] *See* F.P. DUNNE, *The Supreme Court's Decisions*, *in* MR. DOOLEY'S OPINIONS 21, 26 (1906) ("[T]here's wan thing I'm sure about.... [N]o matter whether th' constitution follows th' flag or not, th' Supreme Coort follows th' iliction returns.").

[5] I refer to "metafederal" courts not simply in the sense captured by Leon Lipson's quip, "Anything you can do, I can do meta." A.A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 n.2 (1979). As developed more fully below, what I am defining as metafederal courts is prefigured in the current majority's state sovereign immunity innovations. Underlying suppositions or overarching postulates are said to compel judicial activism by Justices who concede that their decisions do not have support in the constitutional text itself. At the same time, the Court makes and breaks the rules with almost gleeful abandon. This approach is particularly striking when one recognizes that a majority of the current Court not only attended Harvard Law School in the 1950s, but also took the famous Hart and Sacks legal process course. *See* Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 133 & n.237 (1998) (observing that "most lawyers learning about federal courts in law schools over the last forty years cut their teeth on the legal process model permeating Hart and Wechsler's [casebook,] *The Federal Courts and the Federal System*," and noting that according to other sources most of the sitting Justices took Hart and Sacks's legal process class at Harvard during the height of the legal process mode of legal thought). Today's justices would not be the first law school graduates to rebel against what they were taught in law school.

formalism."[6] Most of the time, however, the rules of the legal game as well as the core assumptions inherent in speaking the language of law support—in fact, celebrate—the claims that judges make in order to sustain the legal order as they follow the law. We are awash now in a hot new debate about the Court's legitimacy and authority—about how to deal with what Jack Balkin aptly describes as rapid moves "from the positively loony to the positively thinkable, and ultimately to something entirely consistent with 'good legal craft.'"[7] Exceptions tend to clarify boundaries. The core problem, however, is not *Bush v. Gore*. A new imperium repeatedly proves willing to overrule the rules, just as it cavalierly trumps the clear directives of the other two federal branches, and even the states, if it may displease this Court.

Ambrose Bierce's definition of "precedent" seems even more apt: "a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases."[8] The current Court is less constrained than even Bierce imagined possible, however. As we will see, in their hands, no statute is definite. A majority proclaims its devotion to the plain meaning of legislation—until they would rather not follow what the statute actually says. Indeed, the current Court repeatedly abuses both the telescope (for example, the abstractions of federalism) and the microscope (for example, the nitty-gritty of federal courts, administrative law, and civil procedure) whenever it suits its pleasure.

Among law professors, there has been much discussion about whether and how to teach *Bush v. Gore*. It tends to focus on whether this decision adds too much too fast to cynicism among law students, who often claim that judges simply are result-oriented. A more troubling question turns out to be: how do we teach a whole new range of metafederal courts decisions to our students while attempting to instill concern for nuance, careful use of language, and craftsmanship?

A brief survey of decisions in the months immediately after *Bush v. Gore* illustrates the Court's incremental anarchic tendencies: this series of decisions looks like the monthly offerings of a weird Outrage-of-the-Month Club. Simply selecting one decision per month from January through June, 2001, illustrates the glib unconcern among the Justices for the usual roles of other branches, for the states, or even for everyday lawyering. Instead, we begin to see a sustained effort to break down the public nature of government at all levels.

Though the Court's decisions generally cruise well below the radar of public

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[6] ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 123-30 (1975).

[7] Jack Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444-45 (2001).

[8] AMBROSE BIERCE, *The Devil's Dictionary*, *in* THE COLLECTED WRITINGS OF AMBROSE BIERCE 187, 330 (1946).

opinion—after all, the public, apparently, hardly noticed during the campaign when candidate George W. Bush got away with calling Justices Scalia and Thomas paradigmatic strict constructionists[9]—even the less frequently noted cases we consider from January through June, 2001, are striking in their lack of respect for governmental authority, as well as in their apparent delight in ignoring or breaking the rules. The impulse of the Justices to undermine the power, and even the legitimacy, of all other contenders is reminiscent of an essential part of classic anarchist thought. There are many kinds of anarchy, of course, and the term should be used with care.[10] Let us first consider several categories of anarchy that the Court itself has specifically decried in the past.

I. TWO DESCRIPTIONS OF JUDICIAL ANARCHY[11]

A. *The Anarchy of Rights Too Ardently Enforced*

Underpinning the Court's rejection of many rights claims in recent years has been a great impulse to identify, and then to claim to avoid, slippery slopes. Anarchy is seen to loom at the bottom of each hill. In the realm of religious freedom, for example, the camel's nose under the tent may be even more prominent than are the ongoing contests over crèches (with or without camels in or near the manger).[12] In *Employment Division, Department of Human*

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[9] *See, e.g.*, Laurie Kellman, *Campaigns Revealed Viewpoints on Justices*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, Dec. 12, 2000, at A1; Michael McGough, *Supreme Speculation*, PITTSBURGH POST-GAZETTE, Oct. 1, 2000, at E-1; Fred Barnes, *Bush Scalia*, THE WKLY. STANDARD (Wash., D.C.) July 5, 1999, at 16. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (discussing popular views, at least as measured by most public opinion polls and by the historic unconcern of the America public with the judges themselves as an election issue).

[10] *See, e.g.*, PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND 52-53 (1991) (detailing differences among four different groups of Italian anarchists).

[11] The distensible invocations of the term "anarchy" by the Court are intriguing. There were slightly over one hundred references to "anarchy" in a LEXIS search of the Court's opinions done on December 3, 2001. Many concern the criminalization of anarchy and its use as a basis for deportation. For example, attorneys Clarence Darrow and Edgar Lee Masters fought a losing battle against Justice-to-be James C. McReynolds when they sought to prevent the deportation of English anarchist John Turner in 1904. *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904) (defining broadly both Congress' power over immigration and the meaning of being an anarchist). Another repeated theme is the idea that "some forms of orderly regulation actually promote freedom more than would a state of total anarchy." Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 546 (1980) (Stevens, J., concurring). The most frequent mention of anarchy, however, has been in citations of Justice Brandeis's famous dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (emphasizing role of government as teacher and deploring lawlessness of government officials) (Brandeis, J., dissenting).

[12] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing a crèche as part of "secular" display); *see also* County of Allegheny v. ACLU, 492 U.S. 573 (1989)

Resources v. Smith,[13] for example, Justice Scalia's majority opinion denied the Free Exercise claims of members of the Native American Church who used peyote as part of their ritual. He explained the Court's rejection of decades of precedent protecting religious belief and practice with the following words:

> If the compelling state interest test means what it says, many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.[14]

As Scalia had it (citing the earlier flag salute decision in *Minersville School District v Gobitis*[15] rather than *West Virginia State Board of Education v. Barnette*,[16] the flag salute decision that overturned *Gobitis* only three years later), constitutionally compelled judicial tolerance of a multitude of religions courts anarchy and therefore must be avoided.[17] To a persistent majority of the current Court, judicial enforcement of established constitutional norms itself may present an anarchic threat.[18] Yet efforts by Congress to enforce

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(disallowing freestanding nativity scene).

[13] 494 U.S. 872, 872 (1990) (holding that states are permitted under the Free Exercise clause to deny unemployment benefits following job loss because of sacramental peyote use). *See generally* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL (2001).

[14] *Id.* at 884.

[15] 310 U.S. 586 (1940) (upholding a state regulation calling for expulsion of students for not participating in the Pledge of Allegiance on account of religious beliefs).

[16] 319 U.S. 624 (1943) (overruling *Gobitis* and declaring unconstitutional state laws that compel the recitation of the Pledge of Allegiance).

[17] It should be added that, beyond his holding in *Smith* explicitly relegating Free Exercise claimants to the polling booths instead of the courts, Scalia has proposed another solution: re-voting, unless plaintiffs present hybrid constitutional rights or can prove the bad motives of the government actors they challenge. Dissenting two years later in *Lee v. Weisman*, Scalia explained that the founders of the Republic "knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek." 505 U.S. 577, 646 (1992). This solution apparently is only available for monotheists.

[18] This is true in other doctrinal realms as well. *Compare, e.g.*, Vacco v. Quill, 521 U.S. 793 (1997) (refusing to interpret the Equal Protection Clause to confer a substantive right to assisted suicide) and San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that the Equal Protection clause guarantees no right to equal education if the inequality is the byproduct of serving a legitimate state interest) *with, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (striking down a Virginia poll tax on Equal Protection grounds); Loving v. Virginia, 388 U.S. 1, 2 (1967) (declaring a Virginia statute barring interracial marriages constitutionally invalid). *See generally* Reynolds v. Sims, 377 U.S. 533 (1964) (declaring unconstitutional an Alabama legislative apportionment scheme that was not reflective of the population); and Skinner v. Oklahoma, 316 U.S. 535 (1942)

constitutional norms are perceived as even worse.[19] Before we look with some care at how sweeping a limitation *Board of Trustees, University of Alabama v. Garrett*[20] actually is, we ought to compare and contrast briefly another fear-of-anarchy strand the Justices repeatedly have identified.

B. *Political Questions and Constitutionally Compelled Restraint*

Luther v. Borden,[21] the granddaddy political question decision that the *Bush v. Gore* majority simply and entirely brushed away, offers the most significant early discussion of anarchy to be found in the pages of the U.S. Reports. In construing the Constitution's Guarantee Clause of Article IV, section 2, Chief Justice Taney explained that in some matters, in times of both war and peace, courts were "bound to follow the decision of the political."[22] Indeed, Taney proclaimed, "If the judicial power extends so far [as to allow judicial scrutiny of decisions left by the Constitution to the political branches], the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."[23]

For the Court, the holding in *Luther v. Borden* had the added appeal of sustaining the status quo against an upstart Rhode Island popular movement that had been defeated years before the Court's decision—with the aid of state judges and federal government muscle. But Taney's opinion also became the *locus classicus* for the core political question idea that the Court is constitutionally obliged to leave some matters to the political branches. In *Dred Scott*, of course, Taney soon proved both inconsistent and tragically unskilled in matters both of principle and prophecy. Seeking to avoid the looming Civil War through aggressive judicial intervention, Taney's lead opinion for the Court voided the Compromise of 1850 in the name of strict construction of the Constitution—whose interpretation was to be the monopoly

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(invalidating sterilization of prisoners on equal protection grounds).

[19] *See, e.g.*, Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990) (leading to the enactment of the Religious Freedom Restoration Act of 1993 (RFRA), which in turn led to City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the enforcement of a law prohibiting the government from burdening religious exercise is beyond the scope of congressional authority as limited by the Establishment Clause)); *but see* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (declining to conclude that the Age Discrimination in Employment Act of 1967 abrogates States' sovereign immunity without explicit language to that effect); United States v. Morrison, 529 U.S. 598 (2000); Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)).

[20] 531 U.S. 356 (2001).

[21] 48 U.S. 1, 40 (1849) (declining to interfere in a Rhode Island dispute regarding the legitimacy of the state government because the issue was political, not judicial, in nature).

[22] *Id.* at 43. It seems somewhat surprising that none of the self-proclaimed legal textualists on the Court claimed, in *Bush v. Gore*, that Article IV's guarantee of "a Republican Form of Government" ought to be dispositive in favor of the only Republican candidate for the presidency.

[23] *Id.*

of judges. Taney argued that Congress unconstitutionally ignored the fact that the Constitution permanently relegated blacks to non-citizenship as a matter of national law.[24]

The relatively tepid public reaction to *Bush v. Gore*, even within the first year after the decision, suggests that Taney greatly overstated his "guarantee of anarchy" theme. With the benefit of hindsight, we surely know that judicial intrusions into questions left by the Constitution to other branches do not always produce anarchy. Indeed, despite the Justices' oft-stated fears, the Court seems generally to emerge from public controversies about its role with renewed credibility. For example, the plunge of federal judges into the political thicket of apportionment decisions along with the demise of the prudential elements of the political question doctrine hardly seem to agitate anyone but politicians and their lawyers. Even claims of racial and/or political gerrymandering, which we will consider briefly when we turn to *Easley v. Cromartie*,[25] do not seem to concern the general public much these days. Moreover, the Supreme Court as an institution seems to emerge from each major crisis into which it wanders with undiminished—and, generally, actually enhanced—popular support.[26] There is, however, another form of judicial decision-making that invites disorder. It enacts a new form, an inch-at-a-time version of judicially-imposed anarchy.

At its base, the Court's end-justifies-the-means initiative reveals a lack of respect for the decisions of the elected national political branches—or, for that matter, for state decision-makers. *Bush v. Gore* may be widely thought of as the paradigmatic case, somewhat excused or else condemned even more for its explicit "this case and this case only" assurance. A sampler of other decisions during the 2000 Term demonstrates, however, that neither the carefree sloppiness about rules nor the temerity at the root of both the stay order and the final opinion in *Bush v. Gore* is atypical. If government officials—or judges—become cynics about the rules, this "breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[27]

But let's get down to cases.

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[24] Dred Scott v. Sandford, 60 U.S. 393, 404-05 (1857). *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE 323 (1978) (enumerating the premises of the Court's argument in *Dred Scott*); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

[25] 532 U.S. 234 (2001).

[26] This point is hard to prove definitively, of course, and *Dred Scott* serves as a powerful counterexample. Nevertheless, politicians as savvy as the two President Roosevelts, for example, discovered that, notwithstanding their personal popularity, taking on the institution of the Court proved to be a significant blunder. *See, e.g.*, *infra* note 132, at 254, 278; Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1758 (2001) (noting that the Court's reconsideration of some controversial decisions in 1937 conserved its institutional prestige and helped defeat Franklin D. Roosevelt's court-packing plan).

[27] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

II. SEPARATION OF POWERS?

The current Court is on a seemingly muted but powerful rampage against Congress. The constitutional dimensions of this ongoing campaign may be relatively well-known, but a whole series of bizarre statutory interpretations slip beneath extensive public notice. Last Term, the Court once again—and, I will argue, more severely even than before—limited Congress' enforcement power under the post-Civil War Amendments. As Justice Breyer argued in vigorous dissent, the Court has begun to treat Congress as if it were an administrative agency, without even affording it the deference such agencies are supposed to receive according to the Court's precedents.[28] In the name of its proclaimed commitment to honor the text of Congress' language, however, the Court last Term took several giant steps to narrow the authority of both Congress and those charged with enforcing Congress' statutory will.

I begin with a fairly detailed examination of *Board of Trustees of the University of Alabama v. Garrett*,[29] the best-known case in my sample and probably the most startling illustration of the current Court's authority-grabbing propensities. Brief consideration of two decisions that sandwiched *Garrett*—in January, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[30] and the paradoxical *Circuit City Stores, Inc. v. Adams*[31] in March—offers additional compelling evidence of the Court's commitment to narrowing severely the breadth of federal statutory language and the protections provided by those in the other branches of the federal government who were sent to Washington through the democratic elective process.

A. *Hardheaded—and Perhaps Hardhearted—States of Mind and Minds of States*

1. Equal Protection v. Positive Law: Protecting the State Fisc Is Enough

In *Board of Trustees of the University of Alabama v. Garrett*,[32] the Court held that the enforcement power granted to Congress through section 5 of the Fourteenth Amendment does not extend to using the Americans with Disabilities Act of 1990 ("ADA") to protect people with disabilities from employment discrimination perpetrated by states.[33] Chief Justice Rehnquist

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[28] *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 376-77 (2001) (Breyer, J., dissenting) (disagreeing with the limited deference the Court affords Congress).

[29] *Id.*

[30] 531 U.S. 159, 161 (2001) (construing the authority of the Clean Water Act not to extend to regulation of abandoned gravel pits).

[31] 532 U.S. 105 (2001) (declining to interpret the statutory term "interstate commerce" consistently with the term's broad constitutional meaning).

[32] 531 U.S. 356 (2001).

[33] *See id.* at 374.

actually manages to go even further in rejecting the results of democratic processes than did the Court in the *Alden* trio[34] and in *United States v. Morrison*.[35] At first reading, Chief Justice Rehnquist's majority opinion in *Garrett* seems a predictable extension of what the Court's vigorous activism in the name of federalism has wrought over the past half-dozen years. Since *Seminole Tribe of Florida v. Florida*,[36] the Court has wielded the Eleventh Amendment and its purported emanations to transform sovereign immunity into an impermeable shield protecting state treasuries. Simultaneously, the narrow majority has chopped away with a vengeance at the power of Congress to counter or supplement a very broad range of decisions by the states.[37] Like judicial activism of a century ago in the name of liberty of contract, today's New Formalism operates almost entirely within its own closed circle.[38] Therefore, in *Garrett*, for example, Rehnquist merely cited a case from the prior Term, *Kimel v. Florida Board of Regents*, to support his sweeping declaration that "Congress may not, *of course*, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."[39] The phrase "of course" belies a bitter, ongoing five to four struggle over

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[34] Alden v. Maine, 527 U.S. 706 (1999) (holding that state sovereign immunity is not limited by the Eleventh Amendment); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act invalidly abrogates state sovereign immunity); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that the state suit provision of the Trademark Remedy Clarification Act was not a valid abrogation of state sovereign immunity).

[35] 529 U.S. 598 (2000).

[36] 517 U.S. 44 (1996). *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331 (2001) *See generally* Symposium, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 115 (2001).

[37] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000). *See generally* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000) (discussing the broad implications of *Morrison* and *Kimel* for federal anti-discrimination laws); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) (forcefully criticizing the Court's categorical distinction of federal and local in *Morrison*).

[38] For a discussion of an earlier era's virtually unfettered activism in pursuit of perceived paternalism, see Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987) [hereinafter Soifer, *Paradox of Paternalism*]. For discussion of the New Formalism, see Aviam Soifer, *Full and Equal Rights of Conscience*, 22 U. HAW. L. REV. 469, 470-74, 484-92 (2000) [hereinafter Soifer, *Full and Equal Rights*].

[39] 531 U.S. at 364 (emphasis added) (citing *Kimel*, 528 U.S. at 79). *Kimel*, in turn, relied on the Eleventh Amendment trilogy from the bitter final day of the previous Term and on *Seminole Tribe* for its claim of "firmly established precedent." *Kimel*, 528 U.S. at 79

this peculiar doctrine of very recent vintage. In any event, the Eleventh Amendment has become trump over all the powers vested in Congress by Article I of the Constitution, to be trumped in turn only by what the Court deems an appropriately "proportional and congruent" use by Congress of its Enforcement Power under section 5 of the Fourteenth Amendment.

Like the majority's reliance on the Eleventh Amendment,[40] however, the Court's severe limitation of the Constitution's broad enforcement power requires neither specific text, nor attention to surrounding history, nor even internal consistency concerning the constitutional reach of congressional power. We ought to consider the 1860s: the Thirty-Ninth Congress surely mistrusted the contemporary Supreme Court, an institution that recently had given the nation the *Dred Scott* decision.[41] In the 1866-68 period, when the Fourteenth Amendment was drafted and declared to be ratified, few Congressmen—or their countrymen in the North—regarded the Civil War's gruesome toll as a sacrifice made to vindicate state sovereignty or to protect the states from the reach of the national government. Indeed, by the current Court's reasoning, *Dred Scott*—which has never been formally overruled by the Court—was clearly the law of the land until at least 1868, when the Fourteenth Amendment was declared to be ratified.[42]

Moreover, because *Dred Scott* was not overruled by the Court and because there certainly were not major Court decisions vindicating civil rights in the decade after the Civil War, the current Court's approach suggests that all of the civil rights acts passed by Congress between 1866 and 1875 must be of dubious constitutionality. Congress gave substance to Fourteenth Amendment rights through the Ku Klux Act of 1871, for example, without waiting for the Court to lead, thereby directly imposing federal antidiscrimination law upon the states.[43] As *Garrett* illustrates, the current Court has devised an entirely

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("Under our firmly established precedent then, if the [Age Discrimination in Employment Act of 1967] rests solely on Congress's Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers"); *Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction"); *Coll. Sav. Bank*, 527 U.S. at 672; *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 636; *Alden*, 527 U.S. at 730-33.

[40] In *Garrett*, for example, the Court proclaims, "Although by its terms the [Eleventh] Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States." 531 U.S. at 363.

[41] *See generally* W.R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1867 (1963).

[42] *See* Soifer, *Full and Equal Rights*, *supra* note 38, at 489-92 (discussing this point briefly).

[43] The Ku Klux Act of 1871 sought to enforce Fourteenth and Fifteenth Amendment rights. Currently codified as 42 U.S.C. § 1983, even the protections of this key civil rights act that remain on the books extend well beyond the rights the Court had recognized by

new series of steps to divide and conquer such congressional power.[44] Three of the moves are breathtaking.

First, the Chief Justice returns to the *City of Boerne* line of cases, claiming that they "confirmed . . . *the long-settled principle* that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."[45] In *Garrett*, the Court's imperial noose tightens considerably. Having switched the burden to anyone seeking to vindicate congressional power, Rehnquist states that "the first step in applying these now familiar principles"[46] is to seek precise identification of the constitutional right at stake.[47] Because the constitutional claims of persons with disabilities rarely reached the Supreme Court until recently, only one source comes to the Court's mind to define the constitutional right: *Cleburne v. Cleburne Living Center, Inc.*[48] Because the *Cleburne* Court purported to apply only permissive lower tier "rational relationship" scrutiny to a claim of discrimination based on the disabilities of the residents of a group home, Rehnquist then says Congress clearly can go no further.[49] Rehnquist thus reads *Cleburne* exclusively in terms of its dictum. Even in this, Rehnquist compounds the bitter irony. He fails to notice, for example, that one of the specific reasons given in *Cleburne* for not applying heightened scrutiny on behalf of the mentally retarded was that a legislative response, "which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the

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1871. *See generally* 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 591-653 (Bernard Schwartz ed., 1970).

[44] This is reminiscent of what the Court did to eviscerate Reconstruction. *See generally* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 41-85 (1997) (discussing *The Slaughterhouse Cases* and other cases that severely limited the meaning and application of the Civil War Amendments). For a somewhat detailed historical account, see Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987) and Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

[45] *Garrett*, 531 U.S. at 365 (emphasis added) (citing City of Boerne v. Flores, 521 U.S. at 519-24). It is not "long-settled" at all, however, but rather an ongoing debate. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970); Bell v. Maryland, 378 U.S. 226 (1964).

[46] Well, "familiar" only since *Boerne*.

[47] *See Garrett*, 531 U.S. at 365.

[48] 473 U.S. 432 (1985) (applying "rational relation" test to determine the constitutionality of a zoning ordinance prohibiting "hospital[s] for the feeble minded"). *But see* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a Virginia statute entailing mandatory sterilization for mentally disabled women); Heller v. Doe, 509 U.S. 312 (1993) (upholding a Kentucky law establishing disparate burdens of proof for committing "mentally retarded" and "mentally ill" individuals).

[49] *See Garrett*, 531 U.S. at 368 ("Thus, the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.").

attention of the lawmakers."[50] *Garrett*, on the other hand, simply snatches away the very kind of legislative victory upon which the *Cleburne* majority thus relied. In fact, Rehnquist entirely ignores what the Court actually did in *Cleburne* as it skeptically applied the rational relationship test. That the disabled plaintiffs in fact won the *Cleburne* case is nowhere mentioned. This kind of selective misreading of a case's holding ought to—and would—embarrass first-year law students.

Next, according to Rehnquist's majority opinion, employment discrimination against persons with disabilities as practiced by states certainly can be rational—and, therefore, entirely beyond the reach of constitutional law. This is the conclusion of a spiffy new Arizona two-step. Rehnquist observes first that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."[51] His nifty next step is: "They could quite hardheadedly—and perhaps hardheartedly—hold to job qualification requirements which do not make allowance for the disabled."[52]

Indeed, in case we missed it, Rehnquist offers a reprise of this move toward the end of his majority opinion. He explains the unconstitutional burden an overreaching Congress imposed with the ADA as follows: "[W]hereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to 'make existing facilities used by employees readily accessible to and usable by individuals with disabilities.'"[53] Stripped to basics, the Court perceives a stark conflict in *Garrett*: it is "ADA versus State $$"—and the rationality of economic maximizing and states' rights must prevail.

This choice between dollars and individual rights against a backdrop of federalism establishes a simple, triumphant syllogism:

(1) It is rational for states to save money by refusing to make any allowances for the disabled.

(2) The Court's equal protection analysis will accept any rational basis for classifications—and even for discriminations—even if they clearly hurt the disabled.

Therefore,

(3) Congress may not use its enforcement powers to reach employment discrimination practiced by states.

Even in the early 1970s, when the Court began to insist that seemingly arbitrary state welfare classifications did not violate equal protection, states still had to offer as a justification more than some perennial and undifferentiated interest in saving money. In *Rodriguez v. San Antonio School*

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[50] 473 U.S., at 445.

[51] 531 U.S., at 367.

[52] *Id.*

[53] *Id.* at 372 (citing 42 U.S.C. §§ 12112(5)(B), 12111(9)).

District, Justice Powell summarized "the lesson" of these welfare cases to be "that it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing [equal protection]." [54] The current Court has insisted that Congress also lacks such rights-defining authority. Logically, only the Executive branch is left—though President Andrew Johnson and the presidency more generally were hardly darlings of the Thirty-Ninth Congress that drafted the Fourteenth Amendment. The ironic result is that the current Court seems to reject the creation of substantive constitutional rights entirely in the name of guaranteeing equal protection unless.[55]

But I wasn't going to talk about *Bush v. Gore* . . .

Under *Garrett*, Congress is now constitutionally disabled from enacting forward-looking legislation that might affirmatively seek to guarantee constitutional rights through the enforcement clauses of the Reconstruction Amendments. The post-Civil War amendments are to be limited starkly to matters of negative liberty. "Poor Joshua!"[56] indeed. To get to this point, the Court simply has arrogated for itself untethered authority to engage in second-guessing Congress.

It is particularly galling that the majority grabs this discretionary authority in the name of determining "the metes and bounds of the constitutional right in question," after which "we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."[57] But the way that the *Garrett* Court determines that Congress has not sufficiently identified such a history and pattern provides its infuriating final move.

The *Garrett* majority resorts to a Fractured Fairy Tale approach, reminiscent of Goldilocks's method of assessing fitness, as it turns to the extensive findings and record assembled by Congress in support of the ADA. If Congress noted

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[54] Rodriguez v. San Antonio Sch. Dist., 411 U.S. 1, 33 (1973).

[55] Three Justices also recently reiterated that "the Equal Protection Clause shields only against purposeful discrimination: A disparate impact, even upon members of a racial minority, the classification of which we have been most suspect, does not violate equal protection." M.L.B. v. S.L.J., 519 U.S. 102, 135 (1996) (Thomas, J., joined by Scalia, J., and Rehnquist, C.J., dissenting)

[56] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (sympathizing with the plaintiff, who was the "[v]ictim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on" but was denied recourse by the majority). Another "Joshua": Congress and the people they represent may seek to move forward, but the promised land turns out to be a gated community. Those who own the place will find protection afforded by the Court, but those who are newcomers are out of luck, even when Congress attempts to give them an equal opportunity to enter. *See generally* Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1513-14 (1989) (discussing the "moral obtuseness" of Rehnquist's decision in *DeShaney*).

[57] *Garrett*, 531 U.S. at 368.

too many examples, as in the Violence Against Women Act struck down in *Morrison*, its legislation is unconstitutional as too sweeping; if Congress found *too few* incidents, however, the record is dismissed as merely anecdotal and, therefore, constitutionally inadequate. What might be *just right* remains a secret, apparently exclusively a matter of what porridge the Justices want for breakfast.

Sometimes the Court almost playfully decides to knock clusters of congressional findings entirely out of consideration just before assessing whether there are enough of them. In *Garrett,* for example, in the course of addressing the extensive record of numerous discriminatory acts perpetrated by state and local governments and duly noted by Congress, the Court used a grand non sequitur to wipe all local government examples away. Discriminatory acts by local entities—normally actionable under 42 U.S.C. § 1983—were essentially made to disappear on the grounds that the Eleventh Amendment has been held to shield states, but not their subdivisions. Thus the Court transformed all of Congress' fact-finding about discriminatory practices by cities, towns, counties and other localities into post hoc nothingness. The Court seems to be unaware that the congresspersons who developed and passed the ADA had no way to know in advance that the Court's recent expansion of Eleventh Amendment barriers—to limit Congress' enforcement power—would have fatal repercussions for congressional fact-finding that they completed years earlier.

Most of all, the *Garrett* majority seems to fear constitutional duties *imposed* on the states. The Fourteenth Amendment is often read as an attempt to require states to do things. Yet as Rehnquist states for the Court, "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[58] Who could have understood, prior to *Garrett*, that the Equal Protection Clause is clearly distinct from positive law?

Startling as this distinction may be, it is consistent: it appears, within the Chief Justice's dichotomous worldview, that states' rights must severely limit or even eliminate federal authority to enact "positive law." When he was new to the Court, Rehnquist wrote that the "Civil War Amendments to the Constitution . . . serve as a sword, rather than merely as a shield, for those whom they were designed to protect."[59] But in today's brave new world,

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[58] *Id.*

[59] Edelman v. Jordan, 415 U.S. 651, 664 (1974). If Rehnquist's statement in *Edelman* might be considered mere protective coloration for an opinion holding that the Eleventh Amendment was a barrier to protect state officials against federal court remedies, Rehnquist's unanimous opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) found that the sovereign immunity barrier was specifically abrogated by the Fourteenth Amendment. *Fitzpatrick* simply cannot be reconciled with the *Boerne* line of decisions discussed *supra*. In fact, *Fitzpatrick* is particularly inconsistent with *Garrett*.

In 1972, Congress extended the 1964 Civil Rights Act's protection against employment discrimination to cover state employees encountering discrimination perpetrated by the

Congress is not allowed any "moral ambition"[60] that might stretch beyond the narrow (or empty) set that entails the Court's miserly sense of enforcement clause congruence and proportionality. *Garrett* illustrates, therefore, that every state's familiar and even admirable desire to "conserve scarce financial

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states themselves. Male employees of the state of Connecticut sued for money damages, claiming that they had been discriminated against by Connecticut's retirement benefits plan. The Court's equal protection doctrine regarding gender discrimination only recently had moved to a somewhat serious rational relationship when Congress amended Title VII in 1972. *See* Reed v. Reed, 404 U.S. 71 (1971). *Craig v. Boren*, 429 U.S. 190 (1976), which established more careful intermediate scrutiny of gender-differential treatment, came four years *after* Congress' amendment and several months *after Fitzpatrick*. Yet Rehnquist's opinion for the Court in *Fitzpatrick* clearly allowed Congress to be far out in front of the Court in its statutory efforts to protect civil rights and to do so with none of the fact-finding specificity now required according to *Garrett*. For example, Rehnquist wrote:

> There can be no doubt that [the Court's precedents have] sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a "carv(ing) out" in *Ex parte Virginia*.

Fitzpatrick, 427 U.S. at 455-56. Indeed, in a manner quite inconsistent with *Garrett*, Rehnquist went on to say:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."

Id. at 456.

The rational basis scrutiny employed by the Court in *Reed* (clearly the substantive constitutional law backdrop the Court had established at the time of Congress' enactment of the 1972 amendments, based on its section 5 enforcement power) turns out paradoxically to be a mirror image of the scrutiny the Court employed in *Cleburne*. In both *Reed* and *Cleburne*, the Court proclaimed that it was merely doing low-level scrutiny, while it actually looked much more closely—and invalidated the state law at issue. The state of Idaho invoked economic efficiency and administrative convenience as defenses in *Reed*, to no avail, as did the state of Connecticut in its losing effort in *Fitzpatrick*. Yet, according to *Fitzpatrick*, *Reed* in no way restricted Congress' section 5 power to extend protection from discrimination far beyond the Court's holdings prior to the 1972 statutory amendments. In *Garrett*, by contrast, Rehnquist uses the rational relationship rhetoric from *Cleburne*—rather than its result—to make *Cleburne*'s low-level standard of review a broad restriction on Congress' power that is the equivalent of the broad deference traditionally allowed state economic regulations.

[60] *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting) (quoting A. STONE, LAW, PSYCHIATRY, AND MORALITY 262 (1984)).

resources"[61] can trump.

2. "Our Own Human Instincts," "The Better Angels of Our Nature," and "Those Disadvantaged by Mental or Physical Impairments"

If the *Garrett* majority opinion ends on a discordant positive law note, Justice Kennedy's concurrence, joined by Justice O'Connor, begins on a genuinely positive note of dawning awareness and of progress. Justice Kennedy offers an important insight: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone."[62] In fact, Kennedy continues, "[Prejudice] may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves."[63]

Yet Kennedy's concurring opinion follows the downward spiral of a tragedy. After his significant opening act, Kennedy quickly establishes a struggle in which we must be embroiled involving the conflict between "our own human instincts" (that make people who are different from us seem very unsettling) on the one hand, and "the better angels of our nature"[64] on the other.

As our baser human instincts and better angels wrestle, Kennedy initially seems to make his own preference clear. He admires the ADA, describing it as "a milestone on the path to a more decent, tolerant, progressive society."[65] Perhaps unconsciously echoing Brandeis's *Olmstead* dissent, Kennedy emphasizes that "law can be a teacher"[66] and that the lessons law may teach can be significant. Indeed, he proclaims sweepingly that "[o]ne of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society."[67]

But there is a fatal flaw. We cannot live in a happy world of citizens learning from law while societal progress is made. The Constitution demands invalidation. Why?

The explanation seems anchored in Kennedy's insistence on reifying sovereignty. Indeed, he is explicit on this point, describing the states as

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[61] *Garrett*, 531 U.S. at 372.

[62] *Id.* at 374.

[63] *Id.*

[64] *Id.* at 375.

[65] *Id.*

[66] *Id.*

[67] *Id.* There seems to be something to Justice Scalia's undiplomatic charge that Justice Kennedy can be "sententious." *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 704 (2001) (Scalia, J., dissenting) (decrying Justice Kennedy's stated satisfaction in his concurrence in *Garrett* that the ADA will help promote a "decent, tolerant, progressive society").

"neutral entities, ready to take instruction and to enact laws when their citizens so demand."[68] Elsewhere Kennedy famously celebrated the genius of the framers for their ability to "split the atom of sovereignty,"[69] yet in *Garrett* he recognizes only neutral states that properly may take instruction only from their own demanding state citizens. There is no middle ground. There may not be a federal legislative teacher.

In the absence of the precondition of "confirming judicial documentation," according to Kennedy, because "purposeful and intentional action [is] required to make out a violation of the Equal Protection Clause,"[70] Congress may not impose money damages against the states to enforce "a new awareness, a new commitment to better treatment of *those disadvantaged* by mental or physical impairments."[71] Only judges are constitutionally reliable.

Upon reflection, the last quoted statement is more striking than it first appears. Though Justice Kennedy began his concurring opinion with references to "our own human instincts" and to "the better angels of our nature," by the conclusion of his brief concurrence, he and Justice O'Connor have begun referring to people with disabilities not as "us"—or even as "those among us"—but rather as "those disadvantaged."

The struggle between human instincts and better angels has been resolved conclusively. The states are "neutral entities." The Court must assure that these sovereigns are not insulted by legislation that lacks "confirming judicial documentation" of a broad pattern of sins committed by the states, which are, after all, not actors themselves—even as employers—but merely empty vessels, responding accountably to the wishes of their citizens.

"It is a most serious charge," Kennedy explains, "to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy."[72] Because such a failure or

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[68] *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring).

[69] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[70] *Id.* at 375. *But see* Bush v. Gore, 531 U.S. 98, 105 (2001) (assessing whether the state satisfied its "obligation to avoid arbitrary and disparate treatment"); *see also, e.g.*, Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (observing that allegations of "irrational and wholly arbitrary" treatment, "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis"); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (finding no rational basis for, and thereby invalidating, application of city ordinance to home for those with mental disabilities).

[71] *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring) (emphasis added).

[72] *Id.* at 375. In sharp contrast, the majority in *Bush v. Gore* appeared to accept the petitioners' core claim that Stevens described as "an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed." *Bush*, 531 U.S. at 128 (Stevens, J., dissenting). Defenders of the *Bush v. Gore* decision sometimes have been explicit on this theme of a rogue Florida judiciary. Thus, for example, at a March 1, 2001 debate about the case that I moderated at

omission "does not always constitute" the proof of an adequately egregious discriminatory pattern or practice, Kennedy claims they never will—unless there is the "predicate" of "the documentation of patterns of constitutional violations committed by the State in its official capacity."[73] If there ever is such adequate "judicial documentation," of course, then the courts that provide the documentation are, presumably, themselves available and able to remedy "patterns of constitutional violations."

The "neutral entities" of the states, therefore, have little to worry about in defending against federal concern to protect "those people," including the group of "those disadvantaged by mental or physical impairment." The tragic ending to Kennedy's concurrence now seems foreshadowed, if not preordained—but it is a tragedy of a simple made-for-TV drama, only loosely based on real life. Ironically, Justice O'Connor—herself a victim of breast cancer—joins Kennedy in ignoring the fact that Patricia Garrett is a victim of both breast cancer and state employment discrimination. Along with many others Congress sought to protect under the ADA, Patricia Garrett surely ought to have counted as one of "us," rather than facing callous dismissal within the anonymous mass of "those disadvantaged."

Initial recognition of the ADA as a vital "milestone" established by Congress "on the path to a more decent, tolerant, progressive society" is rapidly transmuted into a millstone. Sisyphus comes to mind as the Court identifies abstractions as "dispositive." States' rights concepts must shield "neutral entities." "Those disadvantaged" cannot hope to move such an elusive and yet massive barrier.

B. *Why a Duck?*

There is piquancy in the realization that the Justices were working on solid waste when the *Bush v. Gore* fandango interrupted their labors. It has a more pronounced kick when the Court proclaims its commitment to prudential restraint in the very next decision handed down. We learn from Chief Justice Rehnquist, writing for the five to four majority in *Solid Waste Agency v. United States Army Corps of Engineers*,[74] that the Court's exceedingly narrow interpretation of the reach of federal law is required by "our prudential desire not to needlessly reach constitutional issues."[75] What is most striking about the decision, however, is the Court's willingness simply to abandon a recent

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Abt Associates in Cambridge, Massachusetts, former Solicitor General Charles Fried maintained that this unspoken but widely known factor supplied the discriminatory motive otherwise missing from the Court's equal protection analysis. Judge Richard Posner claims that the Florida Supreme Court was "unreasonable," "butchered the state's election law," and "erred grievously." *See* POSNER, *supra* note 3, at 147-49. To Posner, "[w]hat is important is recognition that interpretation can be a mask for usurpation." *Id.* at 113.

[73] 532 U.S. 105 (2001).

[74] 531 U.S. 159 (2001).

[75] *Id.* at 172.

precedent quite directly on point[76] in order to carve away the reach of an agency's jurisdiction—while also raising significant doubts about the reach of Congress' power. These questions—which the majority claims compel it to narrow the Army Corps's long-standing interpretation of its jurisdiction over waters in an abandoned sand and gravel pit that are to be filled with solid waste and that are home to over 100 species of migratory birds—otherwise would allow an administrative agency to "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power."[77]

As Justice Stevens's dissent makes clear, the majority's rejection of federal jurisdiction protecting migratory birds—an interpretation of statutory language that the Army Corps of Engineers adopted during the Reagan Administration—is many decades out of date; it is also based on a remarkably selective reading of legislative history and the Court's own precedents. The majority offers an almost defiant refusal to attend to Congress' changing policies regarding extensive federal regulation of waters, even when the waters are not navigable. If unraveling the entire interpretive tangle is a bit too complicated for our purposes, the gist of the argument boils down to a clash between the majority's definitional approach, which is insistent on dividing bodies of water from one another according to what type each is said to be (thereby leaving many of them to be regulated, if at all, by the states or the market), and the dissent's more flexible approach, which perceives waterways, pollution, and migratory birds as interconnected national matters that Congress may readily reach, regulate, and allow experts such as the Army Corps of Engineers to administer.

Rehnquist first concedes that Congress has broad Commerce Clause power and that Congress intended to reach "at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[78] But he then marks the watery spot for future constitutional limitation. Rehnquist does this by emphasizing the Court's recent decisions restricting congressional power and by finding "plausible" a narrow interpretation of Congress' use of the phrase "other . . . waters" elsewhere in the Clean Water Act.[79]

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[76] *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) (determining that "the Court of Appeals erred in concluding that a narrow reading of the Corps' regulatory jurisdiction over wetlands was 'necessary' to 'avoid a serious taking problem'").

[77] *Solid Waste Agency*, 531 U.S. at 173. Rehnquist added: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the Migratory Bird Rule would also result in a significant impingement of the States' traditional and primary power over land and water use," and thus his reading would thereby avoid such "significant constitutional and federalism questions." *Id.* at 174. Note that the mention of federalism questions as distinct from constitutional questions seems a surprising—and revealing—alteration of the usual rule concerning statutory interpretation that seeks to avoid only unnecessary *constitutional* questions.

[78] *Id.* at 167 (quoting *Riverside Bayview Homes*, 474 U.S. at 133).

[79] *Solid Waste Agency*, 531 U.S. at 171 (determining that § 404(g)(1) should not be read

Rehnquist expresses considerable skepticism in response to the argument that the "Migratory Bird Rule" at issue falls within Congress' power to regulate intrastate commerce that "substantially affects" interstate commerce. That "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds" is hardly sufficient, Rehnquist maintains, because the Court "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."[80] The contrast regarding the appropriate role of the Court could hardly be starker when *Solid Waste Agency* is compared to Justice Holmes's great, sweeping opinion in *Missouri v. Holland*, which upheld national regulation of migratory birds, via a treaty, as a "national interest of very nearly the first magnitude."[81] Holmes rejected the federalism arguments invoked on behalf of the authority of the states over migratory birds as "some invisible radiation from the general terms of the Tenth Amendment."[82] Rehnquist and the *Solid Waste* majority, however, perceive "significant constitutional and federalism questions"[83] that compel them to reject Congress' apparent wishes, as well as to refuse to defer to administrative judgment. Fans of the comparative starkness of contrasts, however, will want to consider the expansive view of the Commerce Clause adopted by the five Justices who formed the majority in *Solid Waste* when they reached another statutory interpretation, again considered against the backdrop of the constitutional reach of the Commerce Clause, two months later in *Circuit City Stores, Inc. v. Adams*.[84]

C. *The Binding of Adams: Expanding Final Arbitration, Dismantling Exceptions, and Enjoining Ongoing State Court Proceedings*

The Court decided in *Circuit City Stores, Inc. v. Adams* that an employee was bound by a mandatory final arbitration agreement he had been required to sign as a condition of his employment. Justice Kennedy's five to four majority opinion holds that an exemption within the 1925 Federal Arbitration Act

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to limit the meaning of "water" elsewhere in the Act). Rehnquist notes, "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Id.* at 173 (citing United States v. Morrison, 529 U.S. 598 (2000), and United States v. Lopez, 514 U.S. 549 (1995), and going on to identify some of the ways Congress' assertion of power would be constitutionally problematic).

[80] *Id.* at 173. The Court says it also would require a clear statement from Congress, *id.* at 172 ("Where an administrative interpretation of a statute invokes the outer limits of Congress's power, we will expect a clear indication that Congress intended that result."), though the Court only recently has imposed such a requirement, decades after Congress passed the statute in question.

[81] 252 U.S. 416, 435 (1920).

[82] *Id.*, at 434.

[83] *Solid Waste Agency*, 531 U.S at 174.

[84] 532 U.S. 105 (2001).

("FAA")[85]—exempting "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—did not reach the employment contract of a sales clerk who had filed a state civil rights suit alleging employment discrimination. The Court instead reads the preemptive sweep of binding federal arbitration to reach the full extent of Congress' Commerce Clause power as construed after 1937, rather than as understood in 1925, when Congress adopted the statutory language at issue.[86] Moreover, reasoning backward from a canon of statutory construction (*ejusdem generis*), the majority declares the obscure statutory exemption in dispute to be so clear as to preclude attention to the legislative intent, which quite clearly was to exclude employment contracts altogether from legislation directed at commercial arbitration. Dissenting, Justice Stevens points out that

> [t]his case illustrates the wisdom of an observation made by Justice Aharon Barak of the Supreme Court of Israel. He has perceptively noted that the "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" has more discretion than the judge "who will seek guidance from every reliable source."[87]

If the Court is indeed "[p]laying ostrich to the substantial history behind the amendment" in its interpretation of mandatory arbitration,[88] an unexamined additional federal courts aspect of the case is downright shocking. Kennedy simply recites that Adams filed an employment discrimination suit in state court and that the employer then requested and received an injunction stopping the state court proceeding. Indeed, the District Court noted that there was no Anti-Injunction Act problem. In his oral order, Judge Legge observed:

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[85] 9 U.S.C. § 1 (2000).

[86] There was no mention of the Court's recent limitations on Congress' Commerce Clause power that loomed so large in *Solid Waste Agency*. *Morrison* was not even mentioned, and the only mention of *Lopez* was for the observation "that Supreme Court decisions beginning in 1937 'ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.'" *Solid Waste Agency*, 532 U.S. at 116 (quoting United States v. Lopez, 514 U.S. 549, 556 (1995)).

[87] *Id.* at 133 (Stevens, J., dissenting) (quoting A. BARAK, JUDICIAL DISCRETION 62 (Y. Kaufmann trans., 1989)). Stevens continues:

> A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.

Id. That "the Court misuses its authority," as Stevens charges, becomes even clearer through Justice Souter's dissent, joined by Justices Stevens, Ginsburg, and Breyer. Souter carefully attends to different phases in Congress' use of—and the Court's changing interpretations about— its Commerce Clause power. He convincingly demonstrates that there simply is no basis for what he describes as the majority's position that "exemption language is to be read as petrified when coverage language is read to grow." *Id.* at 137 (Souter, J., dissenting).

[88] *Id.* at 128 (Stevens, J., dissenting).

> I think it's clear from the U.S. Supreme Court decision in Moses Cohn [sic], that the Anti-Injunction Act does not prevent a federal court to—from entertaining a petition to compel arbitration, and that's true even though the underlying suit—the underlying dispute to be arbitrated is one pending in state court.[89]

Contrary to what Judge Legge asserts, however, the Supreme Court explicitly did not reach the Anti-Injunction Act issue in *Moses H. Cone*.[90] Yet the old hydraulic pressure of Our Federalism[91] is notably entirely absent in the discussions by the Court of Appeals and the Supreme Court. This is no federal civil rights claim in which deference must be accorded ongoing state proceedings. It is mandatory binding arbitration, so even the views of twenty-two state attorneys general must be sacrificed on the altar of the purportedly clear language of the Sixty-Eighth Congress. Thus, in refusing to consider the context of the FAA, and ignoring the testimony of the then-Secretary of Commerce Herbert Hoover,[92] for example, the Court simply can embrace the concerns of big employers such as Circuit City.

Indeed, the Court emphasizes the breadth of coverage by the FAA, ironically invoking the broad sweep of Congress' Commerce Clause power to freeze out the employment discrimination claims of a lowly clerk in a consumer electronics store. To do so, Kennedy must stress and embrace the more expansive meaning of Commerce Clause power through the Court's

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[89] Circuit City Stores, Inc. v. Adams, No. C98-0365, 1998 U.S. Dist. LEXIS 6215, at *8 (N.D. Cal. April 29, 1998) (original in lowercase).

[90] "We need not address whether a federal court might stay a state-court suit pending arbitration under 28 U.S.C. § 2283." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1983). For a convincing critique of the practice of enjoining state proceedings in the context of arbitration, see Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91 (1998).

[91] *See, e.g.*, Aviam Soifer & Hugh C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977) (discussing Younger v. Harris, 401 U.S. 37 (1971), which, in the name of state overeignty, required federal courts to abstain even in civil rights cases for which they had jurisdiction, and noting aggressive use of the vague judicial concept of "Our Federalism" to constrain federal courts, rather than abiding by legislative directives).

[92] See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 127 (2001) (Stevens, J., dissenting).

> [A]nother supporter of the bill, then Secretary of Commerce Herbert Hoover, suggested that "if objection appears to the inclusion of workers" contracts in the law's scheme, it might be well amended by stating "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added to section 1, and the amendment eliminated organized labor's opposition to the proposed law.

Id. (citations omitted).

interpretations that have changed significantly since 1925. Paradoxically, however, the Court reads the sweep of the FAA as fully as possible—in other words, as the Court read the Commerce Clause after 1937.[93] But simultaneously the majority insists on a static, narrow definition in its interpretation of the exemption for some employment contracts. To do otherwise, and to require Congress, judges, and litigants to attend to the particular understanding of the breadth of the Commerce Clause at the time statutory language was enacted, would involve "deconstruct[ion]" that would be "unwieldy."[94]

The *Adams* Court also seems deeply paradoxical as it resolves a key jurisprudential conundrum intertwined with *Bush v. Gore*. Courts apparently do change statutory law as they interpret it. Not only is such interpretive change legitimate, according to the *Adams* majority (composed of the same Justices who constituted the majority in *Bush v. Gore*), but courts also must wrestle with the question of whether an expansive view of FAA coverage of contracts "involving commerce" extends to the FAA's exemption of workers "engaged in commerce." In holding that the exemption does not reach this far, Kennedy's opinion refuses to "take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the statute means now."[95] Indeed, in viewing the statutory exemption as static—while the statute's mandatory arbitration coverage is seen by the Court to have expanded over time through judicial interpretation— Kennedy offers a fine example of Thomas Reed Powell's definition of thinking like a lawyer: "If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind."[96]

Small wonder that Stevens's dissent accuses the majority of utilizing a "deliberately uninformed, and hence unconstrained" approach to "produce a result that is consistent with a court's own views of how things should be," but that "may also defeat the very purpose for which a provision was enacted."[97] This bizarre approach thus turns out to be a crucial element of the new role of metafederal courts vis à vis the intentions of those who prevail through the

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[93] In fact, in contrast to *Solid Waste Agency*, the sole mention of the Court's recent decisions limiting the Commerce Clause power is a quotation from *Lopez* used to make the opposite point. Justice Kennedy determines that the Commerce Clause should not be read in the narrow way it was interpreted in 1925. *Solid Waste Agency*, 532 U.S. at 116 (citing United States v. Lopez, 514 U.S. 549, 556 (1995), for the proposition "that Supreme Court decisions beginning in 1937 'ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause'").

[94] *Adams*, 532 U.S. at 118.

[95] *Id.* at 116.

[96] Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930) (quoting Thomas Reed Powell).

[97] *Adams*, 532 U.S. at 133 (Stevens, J., dissenting).

electoral process and the commonplace rules generally used to resolve legal conflict.

III. CIVIL RIGHTS REDUX

A. *The Rules of Justice, The Rules of Other Virtues*

> *The rules of justice may be compared to the rules of grammar; the rules of the other virtues, to the rules which critics lay down for the attainment of what is sublime and elegant in composition.*[98]

Significantly changing legal rules will often significantly change civil rights. After all, civil rights are enfolded within law, a kind of halfway house between the personal and private on one hand, and the political and official on the other. Moreover, changes in legal rules and concomitant changes in civil rights often are to be applauded, even when it is the judiciary that leads the way.[99] If we no longer expect neutral principles, however, we still may hope for relative candor and consistency as our judges interpret constitutional phrases and congressional language in the realm of individual and group rights. As Alexander Bickel observed: "The Court should maintain itself in the tension between principle and expediency."[100] A small selection of the decisions handed down between April and June, 2001 suggests that our current Court seeks to break the tension. This Court is extraordinarily willing to bend or to alter the rules governing standard of review, equity, and summary judgment in pursuit of other goals.

Only in part to suggest that I am an equal opportunity critic, I begin with Justice Breyer's opinion for the Court in *Easley v. Cromartie*,[101] the latest round in the seemingly perpetual legal struggle over the acceptable apportionment of North Carolina's Twelfth Congressional District. In one sense, this fourth round at the Supreme Court level poses and answers a simple question: Did the three-judge court below commit clear error when it found that the North Carolina legislature used race to redistrict? After reviewing the evidence in considerable detail, a majority of the Court says it did. Breyer's opinion ultimately finds the motivation behind the redistricting to have been predominantly political,[102] rather than predominantly racial. The lower court thus committed clear error.

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[98] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 205 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

[99] *See, e.g.*, CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 67-98 (1965) (discussing role of judicial review for constitutionality); *see also* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

[100] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 42 (1962).

[101] 532 U.S. 234 (2001), *rev'g* Cromartie v. Hunt, 133 F. Supp. 2d 407 (E.D.N.C. 2000).

[102] *Id.* at 241 (reversing the District Court's finding that the legislature's motive was predominantly racial and not political).

John Hart Ely masterfully decimates the Court's false dichotomy between racial and political motivation, pointing out persuasively that both were very much present in North Carolina and that it is impossible to separate them enough to make a meaningful choice as to which is "predominant."[103] There is no question that the Court's extremely dubious earlier opinions in this litigation, beginning with *Shaw v. Reno*,[104] and in the ongoing dispute over a majority-minority district in Georgia as well,[105] boxed the Court into an awkward corner.[106] Breyer clearly needs considerable wizardry to get out of that box, while somehow holding onto Justice O'Connor's vote. But to say that the three-judge Court committed "clear error" seems to flunk any genuine straight-face test. The moment that gives the game away most clearly is when Breyer rejects the District Court's primary reliance on "evidence of voter registration, not voting behavior."[107] The experts who testified before the District Court differed, of course. But it is startling that the Supreme Court overturns the lower court decision based on what Ely decries as a racial stereotype of its own concerning how African-Americans tend to vote. The Court states that it is constitutionally acceptable that the North Carolina legislature remained unsatisfied with the inclusion of a seemingly safe majority of registered Democrats in the Twelfth District. Those doing the redistricting could have relied on the assumption that white registered Democrats often cross over and do not vote Democratic, while black Democrats reliably vote heavily Democratic. Therefore, according to Breyer, "political affiliation

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[103] *See* John Hart Ely, *Partisan Gerrymanders and Racial Stereotypes: Maybe We Should Apply the Bizarreness Test to Court Opinions*, 56 U. MIAMI L. REV. (forthcoming July 2002) (manuscript at 12-16, on file with author). In Ely's view, political gerrymandering should be unconstitutional, just as racial gerrymandering has been held to be. *Id.*

[104] Shaw v. Reno, 509 U.S. 630 (1993); Shaw v. Hunt, 517 U.S. 899 (1996); Easley v. Cromartie, 532 U.S. 234, 121 S.Ct. 1452 (2001). 526 U.S. 541 (1999) (the case name was changed from Hunt when a new governor took over in North Carolina).

[105] Miller v. Johnson, 515 U.S. 900 (1995) (holding that Georgia's redistricting plan violated the Equal Protection Clause).

[106] *See* Ely, *supra* note 103 (manuscript at 5-6) (noting that continued contortion of redistricted subdivisions was "enough to challenge a Houdini"). This particular constitutional law morass is traceable to dubious reasoning in *Shaw v. Reno*, 509 U.S. 630 (1993) (accepting plaintiffs' standing and claim of a constitutional right "to participate in a 'color-blind' electoral process"). The Court compounded the problem in *Miller v. Johnson*, 515 U.S. 900 (1995) (suggesting that complying with Department of Justice requirements, to implement the Voting Rights Act of 1965, as amended, did not constitute a compelling state interest). The Court's recent solicitude for the feelings of individual voters who desire color-blind electoral processes contrasts sharply with *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (requiring proof that at-large voting system in Alabama was maintained for a racially discriminatory purpose, and arguing that because African-Americans were not allowed to vote when the system was instituted in 1911, the system could not have been put in place for discriminatory purpose).

[107] *Cromartie*, 532 U.S. at 244.

explains splitting cities and counties as well as does race."[108] Thus, according to the Court, the three-judge court below—the judges all from North Carolina, and all well-acquainted with the Twelfth District saga—believed the wrong expert and were clearly erroneous in the way they found the facts.

A key target of Ely's critique is the majority's assumption that political gerrymandering serves a constitutional end. He argues that "partisan gerrymandering is more clearly unconstitutional than pro-minority racial gerrymandering."[109] Without directly entering that fray, however, we might simply note how much *Easley v. Cromartie* stands as a deeply ironic counterpoint to *Bush v. Gore*. *Cromartie* plunges into issues that turn on the intent of those voting, for example, while *Bush v. Gore* seems to mock such an inquiry. Breyer does not even mention uniformity as a value. Rather, *Cromartie* accepts—even celebrates—self-dealing by politicians who blatantly seek to guarantee their own political futures. In contrast, of course, *Bush v. Gore* rejected the efforts of the Florida courts to capture the intent of the voter in contested ballots. And a guarantee of uniformity became the Court's central equal protection value.[110]

B. *Losing By Winning*

If there were a contest for the most preposterous decision of the Term, *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*[111] surely ranks near the top. This might be particularly the case if nine people, chosen at random from a phone book,[112] were asked to decide. *Buckhannon*'s basic question is: Who is a "prevailing party" entitled to attorneys' fees under federal civil rights statutes? The issue is simple, and the practical implications are substantial. The Court's answer is entirely untenable, however, and it suffers from the practical effect of needlessly clogging the federal courts. And the main basis for the Court's decision turns

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[108] *Id.* at 252.

[109] Ely, *supra* note 103 (manuscript at 26) (citing arguments he developed in John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 612 (1998)).

[110] "[O]ne source of [the vote's] fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. . . . Equal protection applies as well to the manner of its exercise." Bush v. Gore, 531 U.S. 98, 104 (2000). Later, the per curiam opinion offered the assurance that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," but the Court left identification of those rules to what might be called a "we know it when we don't see it" standard. *Id.* at 106. *But see* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999) (rejecting statistical sampling technique to improve accuracy of census results derived from subjective human reporting and accounting).

[111] 532 U.S. 598 (2001) [hereinafter *Buckhannon*].

[112] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (stating that the time when a life is no longer worth preserving is not "known to the nine Justices of this Court any better than they are known to nine people picked at random from the . . . telephone directory").

out to be *Black's Law Dictionary.*

The facts are relatively simple. West Virginia's state fire marshal cited several residential care facilities for violations of a state law that required all residents to be capable of "self-preservation."[113] This West Virginia law clearly was inconsistent with the federal Fair Housing Act of 1968, however, and it very possibly violated the ADA as well. Several owners of residential facilities, as well as some of the aged residents, filed suit in federal court. While the suit was pending, the West Virginia legislature repealed the statute at issue, [114] and the state of West Virginia ultimately moved successfully to dismiss the suit as moot. Then the plaintiffs, maintaining that their lawsuit was the catalyst for the repeal of the statute, sought attorneys' fees as the "prevailing party" under the relevant civil rights statutes.

By a six to five vote in 1994, however, the Fourth Circuit had become the only Circuit to reject a "catalyst" theory, utilized throughout the federal court system to define "prevailing party" under such statutes. In a per curiam opinion, therefore, the *Buckhannon* Fourth Circuit panel affirmed that the District Court was bound to follow this Fourth Circuit precedent.[115] Chief Justice Rehnquist's majority opinion embraces the Fourth Circuit rule and holds that some judicial imprimatur is a prerequisite to being compensated as a "prevailing party." For a party to have "achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct"[116] will not suffice. Rehnquist's majority opinion declares that this is because Congress employed the term "prevailing party" as "a legal term of art."[117] Instead of the Justices' recent and oft-declared devotion to the plain meaning of ordinary language, the Court simply relies upon the seventh edition of *Black's Law Dictionary* to discern the meaning of this legal term.[118] *Black's Law Dictionary* trumps the Court's own recent dicta, the views of all the circuit courts except the Fourth Circuit, the statutory civil rights context, and multiple precedents stretching back into the nineteenth century and carefully marshaled in Justice Ginsburg's dissent.

Justice Scalia, joined by Justice Thomas, concurs but writes separately "in

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[113] Plaintiff Dorsey Pierce, who was 102 years old, had resided at Buckhannon for approximately four years. She and two other Buckhannon residents could not get to a fire exit without some assistance, which apparently was readily available. *See Buckhannon*, 532 U.S. at 623.

[114] In fact, in the course of the litigation, the District Judge actually took the unusual step of imposing Rule 11 sanctions against West Virginia for failing to disclose the pending repeal.

[115] *See, e.g.*, S-1 & S-2 By and Through P-1 & P-2 v. State Bd. of Educ., 21 F.3d 49, 51 (4th Cir. 1994) (en banc) [hereinafter *S-1 & S-2*] ("The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiffs as a prevailing party.").

[116] 532 U.S. 598, 605 (2001).

[117] *Id.* at 603.

[118] *Id.*

order to respond at greater length to the contentions of the dissent."[119] But Scalia's method of distinguishing older precedents comes down to non sequiturs such as noting, and thereby dismissing, a decision contrary to his view because it was an equity case.[120] While Scalia is known to be a great fan of the common law, he does not explain why identifying a precedent as an equity case relegates it to the dustbin. Nor does he do a convincing job in distinguishing numerous cases that awarded costs without a judicial imprimatur. Moreover, it is striking to find Scalia insisting not on ordinary language, but arguing instead that "[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."[121]

Dissenting in a habeas corpus case at the end of the 2001 Term, Justice Breyer deftly critiques excessive judicial reliance on texts in isolation and on dictionaries:

> Language, dictionaries, and canons, unilluminated by purpose, can lead courts into blind alleys, producing rigid interpretations that can harm those whom the statute affects. If generalized, the approach, bit by bit, will divorce law from the needs, lives, and values of those whom it is meant to serve—a most unfortunate result for a people who live their lives by law's light.[122]

And *Black's Law Dictionary* seems a particularly unreliable anchor for Supreme Court decisions. In a fine recent article, Ellen Aprill carefully examines how law dictionaries are composed.[123] It turns out that *Black's Law Dictionary* is compiled primarily of interpretations culled from the opinions of state court judges. Its editors do not even purport to use the principles of professional lexicography. Indeed, the preface to the sixth edition of the "hodgepodge" that is *Black's Law Dictionary* concludes with "A Final Word of Caution," warning readers that "a legal dictionary should only be used as a 'starting point' for definitions."[124] In their debate over how to define

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[119] *Id.*, at 610 (Scalia, J., concurring).

[120] *Id.*, at 612 (Scalia, J., concurring).

[121] *Id.*, at 615 (Scalia, J., concurring).

[122] Duncan v. Walker, 121 S.Ct. 2120, 2135 (2001) (Breyer, J., dissenting, joined by Ginsburg, J.).

[123] Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 303-14 (1998) (examining "how [legal dictionaries] formulate their definitions and on what the definitions are based").

[124] BLACK'S LAW DICTIONARY iv (6th ed. 1990); Aprill, *supra* note 123 at 309. Aprill states about the Sixth Edition that "[t]he current edition of *Black's Law Dictionary* is, as Professor Mellinkoff points out, a hodgepodge of old and new, current and obsolete, without indication of their current status." *Id.* at 306 (referring to David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423 (1983)). Aprill summarizes her argument about the judicial use of dictionaries to ascertain statutory meaning as follows: "It gives a false sense of authority, precision, neutrality, objectivity, and certainty." *Id.* at 313. *See also* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to*

"prevailing party," the Justices also contest the relative justice of their conclusions and its effect on "less well-heeled"[125] advocates, in ways that would not surprise any court-watcher. What none of the Justices address, however, is the backlog of cases likely to result. After *Buckhannon*, unless Congress acts to amend the statutes to make its intentions even clearer, even lawyers who wish to settle with some attorneys' fees at stake must wait for a judicial stamp of approval for their settlements. This hardly seems an inducement for either efficiency or justice.

C. *Neutrality and a Neutered Establishment Clause: Piercing the Veil of Summary Judgment Law*

At first glance, the Court's decision in *Good News Club v. Milford Central School*[126] may seem a victory for freedom of expression, as well as the next logical step in the Court's development of the constitutional importance of viewpoint neutrality by public officials. A small school district in northern New York State, given various options by state law, decided to allow a variety of uses of school property for after-school activities. When the Good News Club applied to run its program immediately after the elementary school day ended, however, the School District determined that the Club's purposes were "primarily religious" and denied them access. Both the District Court and the Second Circuit upheld this decision, but the Supreme Court reversed, holding that this case clearly was governed by two of its recent precedents.[127]

Cacophony and Incoherence in the Administrative State, 95 COLUM. L. REV. 749 (1995). For all the recent insistence by some of the Justices on the precision they claim to find in dictionaries, they sometimes even fail to quote accurately the myriad dictionaries they use and also misleadingly quote particular meanings without noting alternative definitions—even when listed as preferred—that undercut their claimed definitional clarity. See, for example, Justice Thomas's insistence on a narrow definition of "discrimination" in *Olmstead v. Zimring*, 527 U.S. 581, 616 (1999) (Thomas, J., dissenting), discussed in Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1315-16 (2000).

[125] *Compare Buckhannon*, 532 U.S. at 623 (Ginsburg, J., dissenting) (arguing that the Court's "constricted definition of 'prevailing party,' and consequent rejection of the 'catalyst theory,' impede[s] access to court for the less well-heeled") *with id.* at 620 (Scalia, J., concurring) (noting in response that "of course, the catalyst theory also harms the 'less well-heeled'").

[126] 533 U.S. 98 (2001) (holding that the Milford school violated the Good News Club's free speech rights when it excluded the Club from meeting after hours at the school).

[127] The two cases in question are *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). Also, *Good News Club* contains an unusual scolding of the Second Circuit for its "remarkable" and "particularly incredible" failure specifically to cite *Lamb's Chapel*. *See Good News Club*, 533 U.S. at 109 n.3. In response, Justice Souter's dissent claims to distinguish *Lamb's Chapel*. *See id.* at 136-37 (agreeing with the lower courts that the facts of *Good News Club* made it distinguishable from *Lamb's Chapel*). He

According to Justice Thomas, writing for the majority, the parties agreed that the after-school program in the public schools was a limited public forum. Nonetheless, the Court decides that to exclude an evangelical Christian club—that sought to appeal to elementary school children—was to violate viewpoint neutrality. Indeed, as Thomas views the School Board policy, it perceived religion as a tainted form of public expression. The School Board, on the other hand, argued that the Club's activity went far beyond offering religious perspectives, but rather involved prayer and other forms of religious practice that made its expression "quintessentially religious."[128] Thus, said the School Board, to permit the use of public school space for such expression would be to violate the Establishment Clause.

There is much to be said—and a great deal surely will be—about how elusive neutrality turns out to be in the context of religious practice and belief. Even parental consent for a program that takes place immediately after school and offers treats as well as salvation to children ages six to twelve will seem problematic to some. Thomas's sweeping diminution of Establishment Clause protections does for that part of the First Amendment almost what Scalia's opinion in the *Smith* peyote case did to pulverize most Free Exercise Clause claims. In fact, Scalia would go further than the Thomas majority opinion to diminish the separation of church and state.[129] Scalia's concurrence perceives surprising parallelism between the goals of the Boy Scouts, which include emulation of President Gerald R. Ford, and the goals of the Good News Club, which include emulation of Jesus Christ.[130] There is an insipid "leveling" in the *Good News Club* version of neutrality. When religious worship and ritual

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also argues that the Second Circuit actually had followed the test announced in *Lamb's Chapel*. *See id.* ("The Court of Appeals . . . realized that the Lamb's Chapel criterion was the appropriate measure . . . ."). Finally, he adds that Judge Miner, the author of the Second Circuit opinion that Thomas decries, cited another opinion written by Miner that extensively discussed and ultimately relied upon *Lamb's Chapel*. *See id.* at 137 n.2.

[128] *Id.* at *passim* (using language in Good News Club v. Milford Ctr. Sch., 202 F.3d 502, 510 (2d Cir. 2000)).

[129] Thus, for example, Scalia claims the case poses "zero" Establishment Clause issues. Rather, he asserts, "Physical coercion is not at issue here; and so-called 'peer pressure,' if it can even been considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected." *Id.* at 121 (Scalia, J., concurring).

[130] Justice Scalia stated:

> The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives [citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 649 (2000)] by giving *reasons* why that is a good idea—because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered—because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ.

Id. at 124 (emphasis in original).

becomes simply another form of speech, both the protections of the Religion Clauses and the essential aspects of faith and ritual have been largely dissolved away.

What is most startling for our purposes, however, is what Thomas's opinion does regarding the procedural posture of the case. Because the School Board prevailed on summary judgment in the two lower courts, it never got to present its Establishment Clause argument. This does not trouble the Court. As Thomas explains, the parties briefed the Establishment Clause issue extensively and neither asked for a remand. The Court simply asserts—in response to many examples of the possible significance that context could have in this case, posed by Justice Breyer in his concurrence and by Justice Souter in his dissent—that specific facts concerning the Good News Club in the Milford schools simply are not relevant. Indeed, the Court both assumes some facts and argues that "there is no evidence" concerning other matters integral to the Establishment Clause inquiry.[131] Simultaneously, Thomas ignores the ways in which the summary judgment posture of the case precluded development of the relevant facts. The Court actually observes that it does not need to know, for example, "when, and to what extent, other groups use the facilities."[132] The majority instead characterizes the Establishment Clause claim as "a modified heckler's veto."[133] That interest—and the attention to context upon which it depends—is simply washed away.

CONCLUSION

What are we to make of a Court that shows so little regard for the rules of the game? How can we make sense of a series of decisions that seem so blatantly incoherent? This is, after all, a Court that calls Congress names in the process of invalidating perceived congressional insults to the dignity of the states[134] and then turns around and insults the states and their judicial

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[131] In his dissent, Souter suggests that "the Court itself points to facts not in evidence, identifies facts in evidence which may, depending on other facts not in evidence . . . be of legal significance . . . and makes assumptions about other facts." *Id.* at 129 (Souter, J., dissenting).

[132] *Id.* at 119 n.9.

[133] *See id.* at 119 ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.").

[134] See, for example, Scalia's opinion for the Court in *College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board*, 527 U.S. 666, 690 (1999) ("Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher."). *See generally* Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 86-7 (2001) ("We are disturbed by the Court's emerging vision in which Congress has substantially diminished powers to conduct its internal affairs or to engage in factfinding and lawmaking that the judicial branch will respect.").

systems.[135] As we have seen, the current Court bounces back and forth, for example, between reliance on ordinary language and insistence that language must be defined in terms of legal art, and between interpreting a Commerce Clause whose meaning has changed through judicial interpretation over time and a static Commerce Clause that always must be read to reflect "the very *principle* of separate state sovereignty."[136]

A majority of the Justices protests far too much as they insist that responsibility for what they are doing is not really theirs. Cognitive dissonance echoes through the opinions we have considered. With constitutional or statutory rulings, or interpretations of lawyers' law or the broad outlines of federalism, this Court can be counted on to insist on its own power and to give little attention to what legislators, administrators, or other judges have had to say. The Justices nurture their own categorical imperatives.[137]

Louise Weinberg and others have demonstrated powerfully that Justice Holmes, and the Court he had recently joined, perpetrated an outrage a century ago. Through Holmes, the Court denied it had equity power to do anything about Jim Crow except to send anyone who complained about disfranchisement back to the outrageous Alabama political process itself.[138] And we can find many additional sobering reasons to be skeptical of Holmes's vaunted judicial restraint.[139] Nonetheless, at least Holmes seemed to strive to

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[135] *Bush v. Gore* may be the most obvious paradigm for the Court's lack of respect for a state judiciary, but a majority of the Court also recently protected states from themselves, for example, in *United States v. Morrison,* 529 U.S. 598 (2000). Though "[t]he National Association of Attorneys General supported the [Violence Against Women Act of 1994] unanimously, . . . and Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy," *id.* at 653 (Souter, J., dissenting), Chief Justice Rehnquist insisted that federalism concerns required invalidation of the Act. Former New Hampshire Attorney General Souter pointed out that thirty-six states and Puerto Rico filed an *amicus* brief urging that the Act be upheld, and only one state supported the counter argument. *See id.* at 654. Thus, Souter proclaimed, "the States will be forced to enjoy the new federalism whether they want it or not." *Id.*

[136] Printz v. United States, 521 U.S. 898, 932 (1997). *See also, e.g.,* Alden v. Maine, 527 U.S. 706, 748 (1999) ("We look both to the essential principles of federalism and to the special role of the state courts in the constitutional design.")

[137] *See, e.g.,* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe,* 111 YALE L.J. 619, 654 (2001) (stating that "[f]rom the 1920s forward, Justices have articulated federal constitutional norms regarding families"). The problem, however, is even deeper than the invasion of this private sphere.

[138] Louise Weinberg, *Holmes' Failure,* 96 MICH. L. REV. 691, 710 (1997) (discussing Holmes's tragic limitation in *Giles v. Harris,* 189 U.S. 475 (1903) in rejecting the intersection of law, equity, and morals by refusing to intervene to protect the right of blacks to vote).

[139] *See, e.g.,* AL ALSCHULER, LAW WITHOUT VALUES (2000); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint,* 44 DUKE L.J. 449, 453 (1994) (arguing that Holmes' judicial restraint emerged from his own flawed personal philosophies and that "to the extent that the classical conception of judicial self-restraint relies on Holmes as one

be consistent most of the time, to believe that the ideal "society of jobbists" would be "free to be egoists or altruists on the usual Saturday half holiday provided they were neither while on the job."[140] Today's Court all too often seems to seek the opposite extreme, all the while denying that the will of the Justices has anything to do with their imposition of metafederal courts on all other public decision-makers. Their opinions seem almost an attempt to "'make the propaganda' to publicize their 'beautiful Idea,'"[141] an effort akin to one of the central motifs within the anarchist movement.

Some might think that what my small sample yields does not differ much from the Supreme Court's "business as usual." The most obvious challenge concerns a comparison to the activism of the Warren Court. But the Warren Court was much more concerned with candor,[142] consistency,[143] restraint in order to respect the other branches of the national government (and often the states as well),[144] seriousness about striving to treat like cases alike,[145] and

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of its historical props, it is a weak conception"); Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 254 (1962-63); *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984); Saul Touster, *Holmes a Hundred Years Ago:* The Common Law *and Legal Theory*, 10 HOFSTRA L. REV. 673 (1982). A vivid, relatively unknown case in point may be found in Holmes's dissent to the application of the Thirteenth Amendment in the context of involuntary servitude in *Bailey v. Alabama*, 219 U.S. 219 (1911), discussed in Soifer, *Paradox of Paternalism*, *supra* note 38, at 271-73.

[140] Letter from Oliver W. Holmes, Jr. to Dr. John C.H. Wu (March 26, 1925), in JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-1932, 27 (1947).

[141] AVRICH, *supra* note 10, at 52-53.

[142] See, for example, *Brown v. Board of Education*, in which Chief Justice Warren's opinion condemning segregated schools conceded that the unanimous Court "cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written." 347 U.S. 483, 492 (1954). In *Harper v. Virginia State Board of Elections*, Justice Douglas's majority opinion striking down the poll tax proclaimed that "the Equal Protection Clause is not shackled to the political theory of a particular era. . . . Notions of what constitutes equal treatment for purposes of [equal protection] *do* change." 383 U.S. 663, 669 (1966) (emphasis in original).

[143] In *McGowan v. Maryland*, for example, Warren wrote for a unanimous Court, rejecting the claim that the exemption of certain business from Maryland's Sunday Closing Law violated equal protection. 366 U.S. 420 (1961). The Warren Court may have disliked many of the results, but it was committed to the idea that rational relationship review was to be extremely deferential. *See id.* at 425 ("Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others."); *see also, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 808 (1969) (rejecting equal protection claim for not extending absentee voting privileges to ballots by qualified Cook County voters imprisoned while awaiting trial).

[144] This was true in the realm of Congress's remedial power. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) (upholding provision of 1965 Voting Rights Act that allowed Spanish-speaking voters educated in Puerto Rico to cast ballots in New York state

attention to the pragmatic consequences of judicial decisions.[146]

In comparing the two eras, the distinction in judicial approaches seems overwhelmingly to be a difference in kind, not merely a difference in degree. To page through any volume of the U.S. Reports from the 1950s and 1960s—no matter what one thinks of the results—is to sense a much greater concern with judicial craft than one finds today. To be sure, there are major institutional differences—though not in the burden of the numbers of cases decided each Term[147]—and differences in the types of cases, in the backgrounds of the Justices, in the increased number of law clerks, and so forth. But the fundamental difference in craftsmanship remains alarmingly stark.

It is intriguing and deeply troubling that the public doesn't seem to know or care. In keeping with Clifford Geertz's observation earlier in the year, what really seems to matter is velocity and volume.[148] Thus we learn that George

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elections); South Carolina v. Katzenbach, 383 U.S. 301, 315-16 (1966) (upholding innovative congressional remedies imposed under 1965 Voting Rights Act). It was also true, however, in the Court's frequent reluctance to condemn state laws. *See, e.g.*, Lassiter v. Northhampton County Election Bd., 360 U.S. 45, 53 (1959) (unanimously upholding literacy test for voting in North Carolina). Even when Warren, at the end of his tenure, wrote the Court's opinion compelling the House of Representatives to seat Representative Adam Clayton Powell, Jr., he showed serious concern about institutional bona fides that contrasts sharply with the decisions I have described. *See* Powell v. McCormack, 395 U.S. 486 (1969).

[145] In *Jones v. Alfred H. Mayer Co.*, for example, Justice Stewart's opinion for the Court dusted off the 1866 Civil Rights Act to support the majority's point that "[a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live." 392 U.S. 409, 443 (1968) (holding that U.S.C. § 1982 bars private racial discrimination in the sale or rental of property and that the statute is a valid exercise of Congress' power to enforce the Thirteenth Amendment); *see also* Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia's anti-miscegenation statute, though it formally affected whites and blacks equally); Green v. New Kent County Sch. Bd., 391 U.S. 430, 440 (1968) (striking down "freedom of choice" plan that failed to eliminate racial discrimination in education "root and branch"). *See generally* James O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19 (1979).

[146] The classic example, very possibly counterproductive yet quite clearly concerned with practical implementation issues, is the remedial opinion, *Brown v. Board of Education II*, 349 U.S. 294, 301 (1955) (instructing district court judges to enter orders necessary to implement Brown "with all deliberate speed").

[147] The number of decisions has declined precipitously in recent years. The total of seventy-six plenary review decisions in the Court's 1999 Term, for example, was the lowest in half a century, and less than half the number of the Court's plenary decisions in its 1972 Term. *See generally* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001) (analyzing the decrease in the size of the Court's docket).

[148] *See* Clifford Geertz, *Life Among the Anthros*, N.Y. REV. OF BOOKS, Feb. 8, 2001, at

W. Bush quickly and vehemently denied reports that Bush told his friends that he had been chosen by God to lead the international fight against terrorism. "It's not true," Bush told *Newsweek*. "I think God sustains us, but I don't think I was *chosen*. I was chosen by the American people."[149] *Bush v. Gore* disappears.

In the first year after the decision, reported opinions at all judicial levels cited *Bush v. Gore* only twenty-nine times.[150] Generally the citations were merely part of a "string cite." The most intriguing discussion of the case, however, came from a federal magistrate judge in New Hampshire in August, 2001.

In *Walker v. Exeter Region Cooperative School District*,[151] Judge Muirhead had to decide whether a recent change in New Hampshire election law violated equal protection. Until a 1999 amendment changed the supermajority required to approve a school bond issue, approval of such a measure required a two-thirds vote within each New Hampshire town. In 1999, however, the New Hampshire legislature lowered the required supermajority to sixty percent in those towns that had adopted official ballot voting procedures, while leaving the requirement at sixty-six and two-thirds percent in those towns that retained a town meeting voting procedure.[152] The plaintiffs in the lawsuit lived in towns that had approved bond issues by more than sixty percent but less than sixty-six and two-thirds percent; they opposed such approvals and claimed two different supermajority requirements violated equal protection, citing *Bush v. Gore*.

Judge Muirhead dismissed their claims, holding that "uniformity among a state's local subdivisions is not a constitutional requisite"[153] because the residents were not similarly situated in terms of equal protection analysis. Muirhead carefully distinguished several recent New Hampshire Supreme Court decisions—including an extremely controversial one about statewide school financing—that might be read to support the federal equal protection

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18 (noting the life-accelerating effect of cyberspace, and stating in the context of a fierce academic dispute that "it is velocity that matters. Velocity and volume").

[149] Howard Fineman & Martha Brant, *The Bushes in Wartime*, NEWSWEEK, Dec. 3, 2001, at 29.

[150] Based on a LEXIS "Shepardize" search, last checked on December 18, 2001.

[151] 157 F. Supp. 2d 156, 159 (D.N.H. 2001) (holding that it was not a violation of the Equal Protection Clause for New Hampshire to impose different voting requirements upon different school districts using different voting procedures).

[152] Judge Muirhead accepted for purposes of his ruling that the legislative history revealed an effort to make it easier to gain approval for school bonds, because the Legislature believed that voters opposing such measures had gained increased influence in ballot procedure towns. *Id.* at 158 ("The legislative history of the amendment reveals that the Legislature's purpose was to reduce the influence of voters opposing bond issues in official ballot districts where, the legislators believed, it had become more difficult to obtain bond issue approval.").

[153] *Id.* at 159.

claims. And he also explained that in *Bush v. Gore*, "the Supreme Court was cautious to limit its ruling in that case to the circumstances before it."[154] "Therefore," said Judge Muirhead, "its applicability to this or any other case involving concerns over voting rights and equal protection is dubious."[155]

As a precedent in the first presidential primary state—the land of "Live Free or Die"—*Bush v. Gore* thus seemed to expire with a whimper, not a bang. Such a short life may be fitting, but it also satisfies the current United States Supreme Court's general result-orientation. *Bush v. Gore* begins to seem like only one of many slashes in the Court's ongoing anarchic arrogation of authority. Despite much posturing by the Justices about the importance of neutrality, their metafederal courts approach turns out to entail one startling innovation after another. The current Court simply blows away the usual rules.

Perhaps emboldened by *Bush v. Gore*,[156] the Court now points its fickle finger of fiat in new directions. Without appreciation of paradox—and apparently bereft of the ability to function comfortably within paradoxical situations—a majority of the Justices seems to mistake proclaiming and then choosing between false dichotomies for orderly legal process. The Court's own power to order has become a substitute for careful, contextual weighing of law and equities. Indeed, the Justices have begun to appear to be cynics when it comes to the rule of law.

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[154] *Id.*, citing Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances").

[155] *Id.* Judge Muirhead stated further that "numerous commentators and law professors have criticized the decision for its usurpation of state court power and its unjustifiable expansion of the Equal Protection Clause," but he decided that it was unnecessary to address "[w]hether the court was in fact guided more by personal preferences than by sound legal principles." *Id.*

[156] There has been some speculation about whether the Court will be more cautious in the wake of the public criticism of *Bush v. Gore*. *See, e.g.*, Alan M. Dershowitz, *Curious Fallout From* Bush v. Gore, N.Y. TIMES, July 4, 2001, at A15 (commenting on the unexpectedness of *Bush v. Gore*, and wondering if Justices would be pushed toward centrist positions because of the public opinion fallout). Unfortunately, it is not implausible that the public's acceptance and/or forgetfulness might actually encourage the Court.